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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 174

ALFRED TERRELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 80-83) is a memorandum opinion and therefore not officially reported. The opinion of the Court of Appeals (R. 101-107) is reported in 179 F. 2d 838.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1950. (R. 108.) On May 2,

1950, Mr. Justice Minton extended the time for filing a petition for a writ of certiorari to July 5, 1950. (Pet. 5.) The petition for a writ of certiorari was filed on July 3, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

The taxpayer entered into a separation agreement with his wife but did not obtain a decree of divorce or of separate maintenance; after he failed to make payments under the agreement his wife obtained judgments based upon the agreement. The question presented is whether he was entitled to deduct from his gross income the payments made to his wife pursuant to the judgments, under the provisions of Section 23(u) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved will be found in the Appendix, *infra*, pp. 10-13.

STATEMENT

The facts, some of which were stipulated (R. 49-63), were found as stipulated (R. 80), and as set forth in the Tax Court's opinion (R. 80-81) are substantially as follows:

The taxpayer resides in Chicago, Illinois. (R. 80.) On November 9, 1926, the taxpayer, then residing in New York City, entered into a separation agreement with his wife, Ethel K. Terrell, then residing in Pleasantville, Westchester County, New

York. Pursuant to this agreement the taxpayer was to pay his wife certain sums for her alimony and for the support and maintenance of herself and their two minor sons. (R. 80.)

The agreement, *inter alia,* stated (R. 81):

> SEVENTEENTH: If the party of the first part fails to keep and observe any of the covenants hereby undertaken by him, the party of the second part may, upon any such default, at her election rescind and cancel this agreement by giving written notice to that effect to the party of the first part and thereupon and thereafter bring such actions and suits, at law or in equity, for damages or for legal separation and separate maintenance, or both, as the party of the second part hereunder may see fit, * * *

Subsequently, the taxpayer defaulted in making payments under the November 9, 1926, agreement, and thereafter his wife instituted actions against him in the Supreme Court, New York County, for the State of New York, for (1) payments due for the years 1927, and 1930 through 1936, and (2) for the year 1937. (R. 81.)

In one of these actions, instituted to enforce the agreement of separate maintenance, an order was entered on May 16, 1939, directing the taxpayer to pay to his wife the sum of $500 per month. This order was pursuant to a judgment against the taxpayer entered in the Office of the Clerk of the County of New York on January 12, 1939, in the sum of $8,035.23, in favor of his wife. (R. 81.)

In the other action, an order was entered on June 24, 1941, directing the taxpayer to pay to his wife the sum of $1,000 per month. This order was entered pursuant to a similar judgment of March 29, 1941, in the sum of $15,974.20, which was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, as reported in 263 App. Div. 948. (R. 81.)

The taxpayer paid to his wife or to her attorneys for her account $12,000 during 1942 and $12,000 during 1943. These payments were made pursuant to, and because of, the order of June 24, 1941, and the judgment of March 29, 1941, as affirmed by the Appellate Division. (R. 81.)

The taxpayer sought to deduct the amounts paid to his wife under Section 23(u) of the Internal Revenue Code, but the Commissioner disallowed the deduction. (R. 10, 11.) The Tax Court decided that the payments were not deductible under Section 23(u) because there was no decree of separation in this case. (R. 83.) The taxpayer appealed to the court below which affirmed the decision of the Tax Court. (R. 101-107.)

ARGUMENT

1. The decision of the court below is correct and there is no basis for further review. Section 23(u) of the Internal Revenue Code (Appendix, *infra*, p. 11) provides in part that a husband may deduct from his gross income amounts includible in

the gross income of his wife under Section 22(k). Section 22(k) of the Internal Revenue Code (Appendix, infra, pp. 10-11) is expressly limited to the case of a wife who is divorced or legally separated from her husband *under a decree of divorce or of separate maintenance.* Therefore, unless there has been a decree of divorce or separate maintenance the husband is deprived of the right to a deduction under Section 23(u). This has been the consistent view of the Courts of Appeals, the Tax Court, and the Commissioner. *Smith* v. *Commissioner,* 168 F. 2d 446, 447 (C.A. 2); *Daine* v. *Commissioner,* 168 F. 2d 449, 450 (C.A. 2); *Wick* v. *Commissioner,* 7 T.C. 723, affirmed *per curiam,* 161 F. 2d 732 (C.A. 3); *Commissioner* v. *Walsh,* C.A. D.C., decided April 24, 1950 (1950 C.C. H, par. 9277); Treasury Regulations 111, Section 29.22 (k)-1 (Appendix, *infra,* pp. 12-13); 5 Mertens, Law of Federal Income Taxation (1950 Supp.), Section 31A.02, p. 312; Gornick, *Alimony and the Income Tax,* (1943) 29 Cornell L. Q. 28, 40; Rudick, *Marriage, Divorce and Taxes,* (1947) 2 Tax L. Rev. 123, 144.

There having been no decree of divorce or of separate maintenance in this case, the taxpayer may not obtain a deduction, under Section 23(u), on account of the payments to his estranged wife during the taxable years. The fact that the payments were made pursuant to a judgment of the Supreme Court of New York County (R. 78-79) is immaterial because that judgment was based upon a volun-

tary separation agreement and there had been no decree of divorce or of separate maintenance. See *Wick* v. *Commissioner, supra; Daine* v. *Commissioner, supra;* Treasury Regulations 111, Section 29.22(k)-1. Cf. *Commissioner* v. *Murray,* 174 F. 2d 816 (C.A. 2); *Van Vlaanderen* v. *Commissioner,* 175 F. 2d 389 (C.A. 3); *Mahana* v. *United States,* 88 F. Supp. 285 (C.Cls.), certiorari denied, 339 U. S. 978.

The taxpayer maintains that the decision of the court below results in lack of uniformity because in New York a husband separated from his wife under a separation agreement cannot obtain a decree of separation. (Pet. 7.) But there would seem to be considerable doubt that in New York a husband separated from his wife under a separation agreement is barred from obtaining a decree of divorce. In the *Daine* and *Murray* cases, *supra,* and in *Levy* v. *Commissioner,* decided May 12, 1948 (1948 P-H T.C. Memorandum Decisions, par. 48,077), petition for review dismissed January 6, 1949 (C.A. 2), it appeared that a decree of divorce had been granted in New York despite the existence of a separation agreement. Moreover, the spouses in this case anticipated a decree of separate maintenance because the separation agreement expressly provided that if the taxpayer failed to observe the contract, his wife could bring a suit for legal separation and separate maintenance, or both. (R. 59, 81.) *Supra,* p. 3. See also *Kloek* v. *Kloek,* 54 N.Y.S.

2d 543. But even if it were true that in New York a separation agreement precluded the right to obtain a decree of separate maintenance, there would be no lack of uniformity in denying the husband a deduction unless there had been a decree. As the Second Circuit explained in *Smith* v. *Commissioner,* 168 F. 2d 446, 448-449, the real lack of uniformity would arise if a separation agreement would have one effect, taxwise, in New York and another effect elsewhere. Compare *Commissioner* v. *Tower,* 327 U. S. 280, 287-288.

The taxpayer incorrectly contends that the decision of the court below is in conflict with that of the Second Circuit in *Commissioner* v. *Murray,* 174 F. 2d 816, and also that the decision in the *Murray* case in effect overruled *Smith* v. *Commissioner,* 168 F. 2d 446, previously decided by the same court. (Pet. 9-10, 25-26.) In the *Murray* case, a decree of divorce had been granted prior to the taxable year, while in *Smith,* as here, there had been no decree of divorce or of separate maintenance prior to the payments to the wife; and "it is not disputed that there must be a decree of divorce or a decree of separation before this section of the statute [Section 22(k)] has any application." *Commissioner* v. *Walsh,* C.A. D.C., *supra.* For that reason, the Second Circuit had no occasion to pass upon or overrule the *Smith* case when it decided *Murray,* and the two opinions are plainly consistent. The language in the *Murray* opinion to which the petitioner adverts (Pet. 10,

25) deals with the wholly separate problem whether the phrase "written instrument incident to such divorce or separation" in Section 22(k) (*infra*, p. 10) refers to any instrument incident to the fact that there had been a divorce or judicial separation, or only to one incident to the divorce or separation *decree*. In either case, a divorce or judicial separation would be a necessary prerequisite and neither exists here. See the Government's Brief in Opposition in *Mahana* v. *United States*, Oct. Term, 1949, No. 745, pp. 8-10, for a discussion of this different issue.

2. At the hearing before the Tax Court, the Commissioner made an alternative argument to the effect that if the payments made by the taxpayer pursuant to the judgment of the New York court based upon the separation agreement should be held to be payments in discharge of a legal obligation imposed upon him under a decree of divorce or of separate maintenance, such payments are not "periodic payments" but are "installment payments" within the meaning of Section 22(k). The Tax Court found it unnecessary to pass upon this question, because it decided that the absence of a decree of divorce or of separate maintenance precluded the deduction of the amounts paid by the taxpayer under Section 23(u). The point was reserved in the Commissioner's brief filed in the court below, which also found it unnecessary to pass upon the question. If this Court should grant the writ and then decide

that the decree based upon the separation agreement was equivalent to a decree of divorce or of separate maintenance within the meaning of the statute, the Commissioner will respectfully request that the case be remanded to the Tax Court with instructions to pass upon his alternative argument.

CONCLUSION

The decision of the court below is correct, there is no conflict of decisions and no basis for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1950.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such

installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171 (b).)

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.22(k)-1. *Alimony and Separate Maintenance payments—Income to Former Wife.—(a) In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).
>
> In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:
>
> (1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or
>
> (2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.
>
> The obligation of the husband must be imposed upon him or assumed by him

(or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

The purpose and effect of section 22(k) may be illustrated, in general, by the following examples, in which it is assumed that the husband and wife make their income tax returns on the calendar year basis:

Example (1) W sues H for divorce in 1942. The court awards W temporary alimony of $25 a week pending the final decree. On September 1, 1942, the court grants W a divorce and awards her $200 a month permanent alimony. No part of the $25 a week temporary alimony received prior to the decree is includible in W's income under section 22(k), but the $200 a month received during the balance of 1942 by W is includible in her income for 1942. Under section 23(u), H is entitled to deduct such $200 payments from his income.

* * * * *

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